

**Center for Regulatory Effectiveness (“CRE”) Second Comments on National Marine Fisheries Service’s (“NMFS”) Notice of 12-Month Finding on a Petition To List the Gulf of Mexico Bryde’s Whale as Endangered Under the Endangered Species Act (ESA).  
Comments filed on February 23, 2017, at  
<https://www.regulations.gov/docket?D=NOAA-NMFS-2014-0157>,  
Pursuant to NMFS’ Extension of Comment Period at  
<https://www.gpo.gov/fdsys/pkg/FR-2017-02-08/pdf/2017-02529.pdf>.**

**And**

**CRE’s Complaint that NOAA/NMFS Are Not Following the Procedures in OMB’s “Agency Good Guidance Practices,” (“OMB Bulletin”), and are Improperly Treating a Significant Guidance Document as a Binding Requirement.**

On February 6, 2017, CRE filed its First Comments with NMFS on the Service’s proposed Bryde’s Whales listing. CRE’s first comments are incorporated herein by reference.<sup>1</sup>

CRE’s Second Comments address one additional issue: NMFS’ failure to comply with the OMB Bulletin and with OMB’s implementing guidance for this Bulletin.<sup>2</sup>

It appears that NOAA/NMFS and the Department of Commerce (“Commerce”) have spent a decade in violation of the OMB Bulletin.

NMFS’ Bryde’s Whale Status Review Report (“SRR”) relies on at least two NOAA/NMFS guidance documents: “NMFS 2015. Guidance on Responding to

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<sup>1</sup> CRE’s first filed comments are available at <http://www.thecre.com/forum13/?p=3135>, and at <https://www.regulations.gov/document?D=NOAA-NMFS-2014-0157-0081>.

<sup>2</sup> The OMB Bulletin is available at 72 FR 3432 (January 25, 2007), <https://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>. Some OMB implementing guidance is available at [https://www.transportation.gov/sites/dot.gov/files/docs/m07\\_13\\_EO\\_13422\\_implementation\\_%5B1%5D\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/m07_13_EO_13422_implementation_%5B1%5D_0.pdf).

Petitions and Conducting Status Reviews under the Endangered Species Act”; and “NOAA acoustic guidance.”<sup>3</sup>

These two guidance documents are significant under the OMB Bulletin. They are obviously encompassed by one or more of the following criteria in the Bulletin’s definition of “significant”:

“a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to:

(i) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(iv) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866, as further amended....”<sup>4</sup>

NOAA/NMFS itself states that its Acoustic Guidance is “highly influential” because its dissemination

“could have a potential impact of more than \$500 million in any one year on either the public or private sector; or that the dissemination is novel,

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<sup>3</sup> See, e.g., page 23 (2015 Guidance) and SRR, page 56 (acoustic guidance), at [http://sero.nmfs.noaa.gov/protected\\_resources/listing\\_petitions/documents/bryde\\_s\\_whale\\_status\\_review\\_final.pdf](http://sero.nmfs.noaa.gov/protected_resources/listing_petitions/documents/bryde_s_whale_status_review_final.pdf). NOAA’s latest acoustic guidance (*Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing* (“Acoustic Guidance”) is at [http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55\\_acoustic\\_guidance\\_tech\\_memo.pdf](http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf). We assume that this is what NMFS is referring to and relying on in the Bryde’s whale record. However, the OMB Bulletin applies to all significant acoustic guidance disseminated by Commerce/NOAA/NMFS.

<sup>4</sup> 72 FR 3432, 3439 (Jan. 25, 2007), at <https://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>.

controversial, or precedent-setting; or that it has significant interagency interest.”<sup>5</sup>

If NOAA/NMFS’ Acoustic Guidance is “highly influential” under this standard, which it is, then it also “significant” under the OMB Bulletin.

We are surprised and concerned that neither of the Bryde’s whale guidance documents--in particular the Acoustic Guidance-- are listed on the Commerce/NOAA/NMFS significant guidance document website that is required by the OMB Bulletin.

We are even more surprised and concerned that there is **NO** Commerce/NOAA/NMFS significant guidance document website—in clear violation of the OMB Bulletin’s requirements. <sup>6</sup>

Before Commerce/NOAA/NMFS can disseminate or use the Acoustic Guidance, or any other significant guidance documents, they must establish and maintain a significant guidance document website that complies with the OMB Bulletin requirements, some of which are set forth below:

“a. Each agency shall maintain on its website -- or as a link on an agency’s website to the electronic list posted on a component or subagency’s website - - a current list of its significant guidance documents in effect. The list shall include the name of each significant guidance document, any document identification number, and issuance and revision dates. The agency shall provide a link from the current list to each significant guidance document that is in effect. New significant guidance documents and their website links shall be added promptly to this list, no later than 30 days from the date of issuance.

b. The list shall identify significant guidance documents that have been added, revised or withdrawn in the past year.”

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“a. Each agency shall establish and clearly advertise on its website a means for the public to submit comments electronically on significant guidance documents, and to submit a request electronically for issuance, reconsideration, modification, or rescission of significant guidance documents. Public comments under these procedures are for the benefit of

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<sup>5</sup> Acoustic Guidance, page 7 and footnote 6, at [http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55\\_acoustic\\_guidance\\_tech\\_memo.pdf](http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf) .

<sup>6</sup> Apparently, Commerce/NOAA/NMFS once had a significant document site, which now contains no documents, is no longer maintained, and defaults to home. This dead site is (was) at [http://ocio.os.doc.gov/PROD01\\_003151](http://ocio.os.doc.gov/PROD01_003151).

the agency, and no formal response to comments by the agency is required by this Bulletin.

“b. Each agency shall designate an office (or offices) to receive and address complaints by the public that the agency is not following the procedures in this Bulletin or is improperly treating a significant guidance document as a binding requirement. The agency shall provide, on its website, the name and contact information for the office(s).”<sup>7</sup>

Commerce/NOAA/NMFS have not complied with any of these OMB Bulletin requirements.

The OMB Bulletin also requires that significant guidance documents themselves shall

“Not include mandatory language such as ‘shall,’ ‘must,’ ‘required’ or ‘requirement,’ unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties.”<sup>8</sup>

The Federal Register preamble to the OMB Bulletin emphasizes the important of clearly stating that the guidance document is not binding:

“Section II(2)(h) clarifies that, given their legally nonbinding nature, significant guidance documents should not include mandatory language such as ‘shall,’ ‘must,’ ‘required’ or ‘requirement,’ unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose consideration by the agency of positions advanced by affected private parties... .

A significant guidance document should aim to communicate effectively to the public about the legal effect of the guidance and the consequences for the public of adopting an alternative approach. For example, a significant guidance document could be captioned with the following disclaimer under appropriate circumstances: “This [draft] guidance, [when finalized, will] represent[s] the [Agency’s] current thinking on this topic. It does not create or confer any rights for or on any person or operate to bind the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach (you are not

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<sup>7</sup> OMB Bulletin, 72 FR 3432, 3440 (Jan. 25, 2007), at <https://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>.

<sup>8</sup> OMB Bulletin, 72 FR 3432, 3440 (Jan. 25, 2007), at <https://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>.

required to do so), you may contact the [Agency] staff responsible for implementing this guidance. If you cannot identify the appropriate [Agency] staff, call the appropriate number listed on the title page of this guidance.”<sup>9</sup>

OMB/OIRA recently reemphasized that

“Agencies should continue to adhere to OMB’s 2007 Memorandum on Good Guidance Practices. As always, agencies should ensure that such documents are the appropriate vehicle for the particular policy goal, and **that it is clear that compliance with any agency guidance is voluntary.**”<sup>10</sup>

Commerce/NOAA/NMFS have not complied with any of these OMB Bulletin requirements.

NOAA/NMFS’ Acoustic Guidance is a “guidance” document where compliance appears to be mandatory rather than “voluntary.” The Acoustic Guidance Document binds both regulators and regulated entities with new and impracticable regulatory requirements.

For example, the Acoustic Guidance uses the term “must” 18 times. The terms “require,” “required,” or “requirements are used 33 times.

As another example, NOAA/NMFS’ Federal Register notice of their new Acoustic Guidance states that after a brief transition period:

“all applications for MMPA incidental take authorization (ITA) and all requests for ESA section 7 consultations involving noise that may affect marine mammals **will include full consideration of the” Acoustic Guidance.**”<sup>11</sup>

In *Croplife America v. EPA*, 329 F. 3rd 876 (D.C. Cir. 2003), the court held that an EPA press release is a rule because the press release states that “the Agency will not consider or rely on any [third-party] human studies in its regulatory decision making.”<sup>12</sup>

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<sup>9</sup> OMB Bulletin, 72 FR 3432, 3436-37 (Jan. 25, 2007), at

<https://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>.

<sup>10</sup> Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, entitled “Reducing Regulation and controlling Regulatory Costs,” Section II (emphasis added), at <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017>.

<sup>11</sup> 81 FR 51694, 51695 col. 1 (Aug. 4, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf> (emphasis added).

<sup>12</sup> See *Croplife*, at <http://www.freelawreporter.org/flr3d/f3d/329/329.F3d.876.02-1057.html>.

The EPA press release in the *Croplife* case is a rule because it **prohibits** consideration. For the same reasons, NOAA/NMFS' new Acoustic Guidance is a rule because it **requires** consideration.

Any and all applicants for an MMPA or ESA Take authorization have only two choices. They have explain to the agencies' satisfaction why their application complies with the Acoustic Guidance; or they have to hope that the agencies will approve differences from the Acoustic Guidance in a variance procedure that is established and required for the first time by the Acoustic Guidance.<sup>13</sup> This variance procedure requires that the applicant commission peer review. NOAA/NMFS warn that differences from the Acoustic Guidance are unlikely to be approved.<sup>14</sup>

The Acoustic Guidance's new variance procedure is not required by any statute or prior regulation. It is unique and original to NOAA/NMFS' new Acoustic Guidance, and it is legally binding.

The Acoustic Guidance's variance procedure conflicts with the OMB Bulletin's assurance that

“You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach (you are not required to do so), you may contact the [Agency] staff responsible for implementing this guidance.”<sup>15</sup>

No “statutes or regulations” require the new variance procedure. Only the Acoustic Guidance requires it.

Oil and gas companies, other regulated entities, and their regulators have to comply with the Acoustic Guidance in order to obtain Take Permits issued by NOAA/NMFS under the MMPA and under the ESA. These Take permits always contain exclusion-zone mitigation and monitoring requirements imposed NOAA/NMFS. These exclusion zone requirements will always be determined by NOAA/NMFS' Acoustic Guidance.

In a footnote, NOAA/NMFS “acknowledges that exclusion zones and monitoring zones have often corresponded to acoustic thresholds [*aka* Acoustic Guidance] but

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<sup>13</sup> 81 FR 51694, 51723 col. 2 (Aug. 4, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

<sup>14</sup> *See, e.g., id.* (“NMFS believes this sets a fairly high bar as to what type of data/alternative approach would justify a departure from the Guidance’s auditory weighting functions and/or acoustic thresholds”).

<sup>15</sup> OMB Bulletin, 72 FR 3432, 3436-37 (Jan. 25, 2007), at <https://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>.

that is not a legal requirement.”<sup>16</sup> This argument is incorrect. Exclusion and monitoring zones that comply with NMFS’ Acoustic Guidance are “a legal requirement.” NMFS’ Take Permits always require exclusion zones based on NMFS’ acoustic standards, which are now prescribed by NOAA/NMFS’ new Acoustic Guidance.<sup>17</sup>

For example, when authorizing offshore oil and gas exploration in the Gulf of Mexico, the Department of Interior always requires exclusion and monitoring zones based on NOAA/NMFS’ current acoustic standards.<sup>18</sup> BOEM explains:

“Acoustic exclusion zone around vessels. All airgun seismic activities will be subject to an acoustic exclusion zone around vessels that will not allow those activities if marine mammals and sea turtles are present within the zone. This ensures that those animals are not exposed to sound pressure levels of 180 decibels or more -- the level that NOAA Fisheries [aka NMFS] has concluded may damage marine mammal hearing.”<sup>19</sup>

The former NOAA/NMFS standard of 180 decibels is now replaced by NOAA/NMFS’ new Acoustic Guidance standards.

NOAA/NMFS’ ESA Biological Opinions and Take Authorizations for offshore oil and gas seismic are another example of how compliance with NOAA/NMFS’ new Acoustic Guidance is a “legal requirement.” NOAA/NMFS’ Opinions and Authorizations always contain “Terms and Conditions” that include “Non-discretionary” exclusion zones based on NMFS’ acoustic standards, which are now prescribed by the Acoustic Guidance.<sup>20</sup>

NOAA/NMFS explain in these ESA Opinions and Authorizations that NOAA/NMFS’ acoustic standards, which are now determined by NOAA/NMFS’ new Acoustic Guidance, “**will be used as the exclusion zone (EZ) for marine mammals, as required by NMFS**”:

“The 180 dB re 1  $\mu$ Parms distance [the current NMFS acoustic standard] is the safety criteria as specified by NMFS (1995) as applicable to cetaceans

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<sup>16</sup> Acoustic Guidance, page 7 fn. 5, at [http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55\\_acoustic\\_guidance\\_tech\\_memo.pdf](http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf).

<sup>17</sup> E.g., Incidental Harassment Authorization (May 2015 NMFS), at [http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/sae\\_2015\\_iha.pdf](http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/sae_2015_iha.pdf).

<sup>18</sup> See, e.g., page 6, at <https://www.boem.gov/BOEM-NTL-2016-G02/>.

<sup>19</sup> <https://www.boem.gov/Typical-Mitigation-Details/>.

<sup>20</sup> E.g., National Marine Fisheries Service Endangered Species Act Section 7 Biological Opinion, page 7, at [http://www.nmfs.noaa.gov/pr/consultation/opinions/fpr-2015-9142\\_nsf\\_south\\_atlantic\\_seismic\\_survey\\_bo\\_final\\_12.31.2015\\_1.pdf](http://www.nmfs.noaa.gov/pr/consultation/opinions/fpr-2015-9142_nsf_south_atlantic_seismic_survey_bo_final_12.31.2015_1.pdf).



under the MMPA. ***The 180 dB will be used as the exclusion zone (EZ) for marine mammals, as required by NMFS*** during most other recent L-DEO seismic projects (Holst and Beland 2008; Holst and Smultea 2008b; Holst et al. 2005a; Holt 2008; Smultea et al. 2004).”<sup>21</sup>

A more detailed discussion of the mandatory nature of NOAA/NMFS’ Acoustic Guidance is contained in CRE’s comments on the Guidance.<sup>22</sup> CRE’s prior and current comments demonstrate that either the NOAA/NMFS’ Acoustic Guidance is a rule, in which case it has violated many OMB regulatory review requirements, or NOAA/NMFS’ Acoustic Guidance is just guidance that violates the OMB Bulletin and OMB’s implementing guidance. In either case, the Acoustic Guidance violates IQA Guidelines and OMB’s Peer Review Bulletin.

If NOAA/NMFS continue to argue that their Acoustic Guidance is just “guidance,” then pursuant to OMB Bulletin Section III. 2 (b),<sup>23</sup> CRE requests that NOAA/NMFS withdraw both their proposed Bryde’s whale listing and their Acoustic Guidance. NOAA/NMFS should not republish them in any form until and unless NOAA/NMFS can demonstrate to OMB’s satisfaction that NOAA/NMFS have complied with the OMB Bulletin and implementing guidance, the IQA Guidelines, and the OMB Peer Review Bulletin.

We are filing this OMB Bulletin complaint in the proposed Bryde’s whale listing record because NOAA/NMFS cite and rely on the Acoustic Guidance in this proposed action, and because there is no official site to file this complaint, in violation of the OMB Bulletin’s requirements.

If, on the other hand, NOAA/NMFS decide that their Acoustic Guidance is binding instead of guidance, then CRE requests that NOAA/NMFS withdraw both their proposed Bryde’s whale listing and their Acoustic Guidance. NOAA/NMFS should not republish them in any form unless and until NOAA/NMFS demonstrates to OMB’s satisfaction that NOAA/NMFS have complied with OMB’s regulatory review

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<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> [http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm\\_cre\\_comments\\_nmfs\\_acoustic\\_icr\\_filed.pdf](http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm_cre_comments_nmfs_acoustic_icr_filed.pdf). These prior CRE comments are incorporated by reference into CRE’s Second Comments as if fully set forth herein.

<sup>23</sup> OMB Bulletin, 72 FR 3432, 3440 (Jan. 25, 2007), at <https://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>. This section of the OMB Bulletin states:

“b. Each agency shall designate an office (or offices) to receive and address complaints by the public that the agency is not following the procedures in this Bulletin or is improperly treating a significant guidance document as a binding requirement. The agency shall provide, on its website, the name and contact information for the office(s).



and other requirements for rules, with the IQA Guidelines, and with the OMB Peer Review Bulletin.<sup>24</sup>

CRE also reiterates and incorporates its relief requested in CRE's first comments on the proposed Bryde's whale comments.<sup>25</sup>

Respectfully submitted,

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<sup>24</sup> These OMB requirements for rules are discussed in detail in CRE's Acoustic Guidance comments at [http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm\\_cre\\_comments\\_nmfs\\_acoustic\\_icr\\_filed.pdf](http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm_cre_comments_nmfs_acoustic_icr_filed.pdf). These prior CRE comments are incorporated by reference into CRE's Second Comments as if fully set forth herein.

<sup>25</sup> CRE's first filed comments are available at <http://www.thecre.com/forum13/?p=3135>, and at <https://www.regulations.gov/document?D=NOAA-NMFS-2014-0157-0081>. They are incorporated by reference into CRE's Second Comments as if fully set forth herein.